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The Council of the EU adopts negotiating directives for a Multilateral Investment Court: An update on EU investment and investment protection policy

On 20 March 2018, the Council of the EU (hereinafter, Council) adopted the negotiating directives authorising the European Commission (hereinafter, Commission) to negotiate, on behalf of the EU, a convention establishing a multilateral court for the settlement of investment disputes. On 6 March 2018, the Court of Justice of the European Union (hereinafter, CJEU) ruled that arbitration clauses in bilateral investment treaties (hereinafter, BITs), concluded between EU Member States, were incompatible with and had "*an adverse effect*" on EU law. In parallel, the European Parliament's (hereinafter, Parliament) Committee on International Trade (hereinafter, INTA) is coordinating the Parliament's position towards the Commission's proposal for EU legislation on the screening of foreign investment in strategic sectors within the EU. It is evident that the EU is in the middle of a number of important initiatives related to investment and investment protection policy, with potentially important repercussions for EU trade, trade policy and EU trading partners.

A key issue is the EU's approach to investment protection. In the 2017 opinion of the CJEU on the competences to conclude the EU-Singapore Free Trade Agreement (EUSFTA), the CJEU determined that the provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and States did not fall within the exclusive competence of the EU (see *Trade Perspectives*, Issue No. 10 of 19 February 2017). This opinion has led to a change in strategy and the Commission now intends to exclude such provisions from its future Free Trade Agreements (hereinafter, FTA). With respect to the intended FTAs with Australia and with New Zealand, the Commission has suggested in the proposed negotiating mandates that the "*Agreement should exclusively contain provisions on trade and foreign direct investment related areas applicable between the parties*" (see *Trade Perspectives*, Issue No. 20 of 3 November 2017). EU Member States are still debating how to handle this new approach on investment protection in FTAs and the consequences of FTAs under '*EU only*' competences and only subject to approval by the Council and the consent of the European Parliament (see *Trade Perspectives*, Issue No. 4 of 23 February 2018).

Since 2015, the Commission has been working to establish a Multilateral Investment Court. The idea largely originated from the public criticism of investment protection provisions and investor-State dispute settlement (hereinafter, ISDS) provisions in trade agreements. At the core of the criticism was their *ad hoc* nature and the lack of legitimacy, consistency and

transparency, as well as the absence of the possibility to review the decisions. The Commission notes that the overall objective for creating a Multilateral Investment Court is to set up a permanent body to decide investment disputes, which would be a departure from the current system of ISDS based on *ad hoc* commercial arbitration. For the EU, the Multilateral Investment Court would replace the existing bilateral investment court systems currently included in EU trade and investment agreements. The EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement already contain provisions in view of the establishment of a permanent multilateral mechanism and provide a reference to it. Similar provisions are supposed to be included in all of the EU's negotiations and agreements involving investment.

On 13 September 2017, the Commission submitted its '*Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes*'. On 20 March 2018, the Council adopted the negotiating directives authorising the Commission to negotiate, on behalf of the EU, a convention establishing a multilateral court for the settlement of investment disputes. On the basis of these negotiating directives provided by the Council, the Commission will commence negotiations with its trading and investment partners in the framework of the United Nations Commission on International Trade Law (hereinafter, UNCITRAL). Obviously, important details of the future Multilateral Investment Court (*e.g.*, the composition of the court, its budget, transparency, the support from a secretariat and procedural rules) depend on the outcome of the upcoming negotiations between the countries that will participate in the negotiations. In previous months, the Commission has, on various occasions, promoted this initiative.

While all is still subject to negotiation, the EU has already laid out the principles that it wishes to see reflected in the future court and noted the following priorities: 1) The court should be a permanent international institution; 2) The judges should be tenured, qualified and receive permanent remuneration. Their impartiality and independence should be guaranteed; 3) Proceedings before the court should be conducted in a transparent manner; 4) The court should give the possibility of appealing against a decision; 5) Effective enforcement of the decisions of the court would be vital; and 6) The court should rule on disputes arising under future and existing investment treaties that countries decide to assign to the authority of the court. All of this is reflected in the negotiating directives.

In view of improving its own transparency, the Council published the negotiating directives shortly after they were approved. Until recently, such negotiating directives remained confidential. The negotiating directives contain specific calls on the EU to pursue transparent negotiations. More specifically, the negotiating directives provide that the EU "*shall strive to ensure that the negotiations are conducted in a transparent manner, including, where possible, through audio- and/or web-streaming, and that representatives of civil society organisations will have the opportunity to participate in the discussions as accredited observers*". While these aspects can be considered as important elements for enhanced public participation during the negotiations, they remain subject to agreement of all other negotiating parties. Previous EU negotiations, for example with the US, have demonstrated that it is not always easy to find common ground on transparency and public participation. It therefore remains to be seen if the transparency objectives contained in the mandate will be agreed by all other future negotiating parties.

While the proposed Multilateral Investment Court was originally an initiative of the EU, the negotiations, based on preliminary analysis and discussions, will be organised by UNCITRAL. Since 2017, the UNCITRAL Working Group III '*Investor-State Dispute Settlement Reform*' is debating the initiative. A first meeting of the Working Group took place in late 2017 and the second meeting is scheduled for the end of April 2018. Apart from organisational matters, the first meeting of the Working Group already debated various substantive issues and delegations submitted comments. However, it is still uncertain which countries will, at the end of the negotiations, join the future Multilateral Investment Court. It is indeed a key concern of interested stakeholders that important economies and emerging

countries will be absent from this future institution, undermining its legitimacy and relevance from the very beginning. Additional criticism, in particular within the EU, concerns a multitude of issues, ranging from fundamental opposition to the existence of investor-State dispute settlement to very technical concerns. For example, the European consumer organisation BEUC notes that "*the EU must ensure that investor claims on consumer protection measures – and public policy interest in general – will not be admissible by the court under any circumstances*". BusinessEurope, the Confederation of European Business, a group representing enterprises of all sizes in the EU and six non-EU European countries, advocates for "*a reformed and effective ISDS (investor-State dispute settlement) that is more transparent, balanced and publicly acceptable*".

Apart from the issue of the Multilateral Investment Court, the issue of arbitration clauses in existing BITs between EU Member States has also recently come under scrutiny, with possible repercussions on the negotiations of a Multilateral Investment Court. On 6 March 2018, the CJEU published the much awaited judgment in the case of *Slowakische Republik v Achmea BV* (Judgment C-284/16). The case concerns the arbitration clause contained in a BIT concluded in 1991 between the former Czechoslovakia and the Netherlands. The BIT provides that disputes between one Contracting State and an investor from the other Contracting State must be settled amicably or, in default, before an arbitral tribunal. The CJEU now ruled that this arbitration clause is not compatible with EU law because the clause "*removes from the mechanism of judicial review of EU law disputes which may relate to the application or interpretation of that law*". More specifically, the CJEU states that "*by concluding the BIT, Slovakia and the Netherlands established a mechanism for settling disputes which is not capable of ensuring that those disputes will be decided by a court within the judicial system of the EU, only such a court being able to ensure the full effectiveness of EU law*" and that in "*those circumstances, the Court concludes that the arbitration clause in the BIT has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law*". The decision could have important consequences for EU businesses, in particular, if applied to other BITs between EU Member States. The EU's trade relations with third countries could also be affected, in case investments made by businesses based in third countries and established in the EU single market might have been protected under those BITs and their arbitration clauses. This situation could persuade affected EU trading partners to partake in the UNCITRAL negations and the future Multilateral Investment Court.

Finally, a further issue that looks poised to significantly affect EU trading partners is the proposed framework for the screening of foreign direct investments into the EU. In his September 2017 Speech of the Union, the President of the European Commission Jean-Claude Juncker announced a *Commission Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union* (see *Trade Perspectives*, Issue No. 17 of 22 September 2017). The initiative aims at addressing concerns on foreign investment within the EU and concerning strategic EU assets (*e.g.*, an EU harbour, part of the EU's energy infrastructure, or a defence technology firm) being taken over by foreign investors, in particular by subsidised and/or state-owned enterprises. Reportedly, the move is a reaction to concerns raised by France, Germany and Italy following increased investment and company acquisitions by Chinese state-owned enterprises. In January 2018, the European Parliament's INTA Committee held a hearing on the issue and is currently working on its report. On 7 March 2018, the *rapporteur* of the legislative file published the *Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union*, which shows a number of amendments, but no fundamental concerns. The INTA Committee is currently scheduled to vote on the report on 17 May 2018.

With respect to the Multilateral Investment Court, the Commission will hold a stakeholder meeting on the multilateral reform of investment dispute resolution including the establishment of a Multilateral Investment Court on 13 April 2018. All interested stakeholders should closely follow the relevant developments and participate in the meeting. The

legislative proposal on the screening of foreign direct investments into the EU is also making important steps forward, as the INTA Committee is scheduled to vote on the report in May of this year. As the EU is in the process of re-shaping its approach to investment policy and investment protection, all interested stakeholders and EU trading partners should get involved and participate in this process.

The alcoholic beverages industry submitted its proposal on alcoholic beverages labelling in the EU

On 12 March 2018, the alcoholic beverages industry submitted a *Joint self-regulatory proposal from the European alcoholic beverages sectors on the provision of nutrition and ingredients listing* (hereinafter, the joint proposal) to the European Commission (hereinafter, Commission) and presented it to the European Commissioner for Health and Food Safety, Vytenis Andriukaitis. The self-regulatory proposal includes four sector specific annexes: 1) The spirits sector annex; 2) The detailed wine and aromatised wine products annex; 3) The European brewers' commitment to listing ingredients and nutrition information; and 4) The European cider and fruit wine association annex.

Within the EU, *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) was the result of intense debates over a number of contentious issues, including the labelling of alcoholic beverages. Article 16(4) of the FIR exempts alcoholic beverages containing more than 1.2% alcohol by volume (hereinafter, ABV) from displaying the mandatory list of ingredients (with the exception of ingredients, which may have an allergenic effect) and the nutrition declaration, which became mandatory for all foods, with few exceptions. However, as a compromise, in the inter-institutional negotiations of the FIR, the European Parliament requested that the Commission prepare a report addressing whether alcoholic beverages should in the future be covered, in particular, by the requirement to provide nutritional information, and the reasons justifying possible exemptions. The Commission published this report on the mandatory labelling of the list of ingredients and the nutrition declaration of alcoholic beverages on 13 March 2017. Main issues in the report include: 1) Whether there should be a list of ingredients for alcoholic beverages; 2) Whether a nutritional declaration for alcoholic beverages should be provided; 3) How the nutritional declaration should be presented to consumers (*i.e.*, per 100 ml or per serving size); and 4) Whether such information could be provided on off-label information sources, such as on the Internet (for more information on these points, see *Trade Perspectives*, Issue No. 6 of 24 March 2017). This report was based on data collected by the Commission through EU Member States and stakeholder consultations. On 4 April 2017, the report was presented to stakeholders in the context of a meeting of the Commission's Advisory Group on the Food Chain, Animal Health and Plant Health, which had been established by Decision 2004/613/EC to consult stakeholders in an open and transparent way at the European level during the preparation, revision and evaluation of EU food legislation.

While the Commission's report concludes that objective grounds had not been identified that would justify the absence of information on ingredients and nutritional information on alcoholic beverages or a differentiated treatment for some alcoholic beverages, it did not insist on mandatory labelling. The Commission noted that the alcoholic beverages sector appeared increasingly prepared to provide responses to consumers' expectations to know what they were buying and consuming. This was attributed to the expansion of concerted or individual voluntary initiatives. Therefore, the Commission granted producers of alcoholic beverages one year to deliver a self-regulatory proposal that would cover the entire sector of alcoholic beverages. This proposal was submitted on 12 March 2018.

The representative associations of the European wine, aromatised wine, spirits, beer and cider sectors state in their joint press release of 12 March 2018 that they "*have responsibly developed a meaningful and adapted voluntary solution to address consumer expectations*

about ingredients listing and nutritional information" and that "*the sectors have worked constructively together since the publication on 13 March 2017 of the Commission report, to put forward a joint proposal to provide consumers with meaningful, clear and easy to understand information on these aspects*".

The sectors' objective is to improve consumer knowledge about the different products and to empower them to make informed decisions about the products that they choose to consume, within a balanced lifestyle. The key elements of the joint proposal drawn up by the European alcoholic beverages sectors are as follows: 1) The nutritional information and the list of ingredients of the products will be provided (in tailor-made and meaningful ways); 2) The nutritional information and the list of ingredients will be given to consumers off-label and/or on-label. Off-label information will be easily accessible from the label itself; 3) Traditional and/or innovative tools (for providing access to information) will be used and comprehensive modern information systems could be developed; and 4) Food business operators responsible for food information will decide how to display the information. Attached to the joint proposal, four sector-specific annexes for beer, cider, spirits and wine have been developed by each sector to further concretely address the process and modalities for implementing the joint proposal for each sector. The annexes are under the sole responsibility of each sector.

For spirits, spiritsEUROPE members commit, in the sector-specific annex, to providing nutrition and ingredient listing by the end of 2022. spiritsEUROPE states that this would be sooner than if it were mandated by regulation (presumably because legislation would take more time to be adopted). spiritsEUROPE suggests that providing nutrition and ingredient listing would be done either on- or off-label, while it is expected that some companies, in particular SMEs, may opt instead for the off-label solution. Other companies might choose on-label information, in addition to the information being available online. Energy information will always be provided per portion (or single serve container) and, as required, per 100 ml. When using online platforms, members of spiritsEUROPE reportedly intend to go beyond the requirements of the FIR and will provide full nutrition information for all spirits and a list of ingredients, as well as the legal definition of every category giving consumers details of the raw materials and the production process. spiritsEUROPE states that, "*whether consumers choose to access information via this harmonised system, or company or brand websites, they will always be able to find everything they need to make informed purchasing decisions*". As regards the digital solution, spiritsEUROPE is partnering with the European Travel Retail Confederation (ETRC), contracted to develop a pilot project making product information for spirits directly accessible, in several languages, by scanning the barcode on the packaging via a smartphone, through in-store scanner facilities and online. The pilot's results are supposed to be available during the second half of 2018.

As the FIR currently stands, spirits producers that wish to voluntarily provide nutrition information on labels must do so per 100ml, which represents more than three standard servings of spirits and might contradict responsible drinking messages. This has been, and remains, a barrier for many operators when choosing where to display this information. This is why spiritsEUROPE invites the Commission to consider: 1) Allowing energy per serving to be mentioned more prominently than the 100ml on spirits labels; and 2) Requiring for all alcoholic beverages not usually consumed per 100ml the mention of energy per serving (or single serve container).

Spirits, unlike most other food sectors, are subject to stringent rules on their production and composition, set out in *Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks*. How spirits are made and what they are made from is, therefore, legally defined and this information is readily available to consumers. Wines and aromatised wines are subject to a number of similar, dedicated regulations at EU level.

In the context of the joint proposal, the industry did not find agreement on a long-standing dispute over how to inform consumers about the number of calories (or energy) contained in alcoholic beverages. This information is perhaps the most important element for many consumers. However, it appears that the legally required declaration '*per 100ml*' is not suitable for most alcoholic beverages. Spirits, for example, are the least calorific alcoholic beverage and a nutrition declaration per 100ml would, in fact, present somehow misleading information because spirits are typically consumed in much smaller quantities. Spirits and beer are generally not served in 100ml portions. Per 100ml, spirits (40% ABV) have around 224 calories. In contrast, wine (12% ABV) has around 74 calories and beer (5% ABV) 43 calories. However, due to the typically smaller serving size, based on alcohol content, spirits have 67 calories per serving size recognisable to consumers, while wine has 74 and beer has 106. The most common measurement used for low risk/sensible drinking guidelines in EU Member States is a '*unit*' of 10g alcohol. This equates to broadly comparable serving sizes of 30ml of spirit, 100ml of wine and 250ml of beer.

Arguably, for producers that wish to provide the information on-label, the requirement to do so per 100ml (even if the serving size can also be given) can act as a deterrent because they do not wish to provide misleading information, or information that contradicts responsible drinking messages. Spirits are usually served in 30ml servings. In Germany, the typical glass with 20ml of *Korn* (*i.e.*, a German colourless distilled beverage produced from fermented cereal grain seed) constitutes an even smaller serving size. There are, in fact, few foods that are consumed in similar doses than spirit drinks. Under the FIR's predecessor, *Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs*, Article 6(2) mandated that (if voluntarily provided) "*Information shall be expressed per 100 g or per 100 ml. In addition, this information may be given per serving as quantified on the label or per portion, provided that the number of portions contained in the package is stated*". Indicating the number of portions was deemed important in the context of giving nutritional information per serving in addition to the indication per 100g or per 100ml. There appears to be no reason why nutritional information per serving cannot be indicated more prominently, if producers so wish.

The publication of the industry's joint proposal triggered strong reactions from public health non-governmental organisations (NGOs), which reportedly said that the industry "*failed*" to responsibly inform EU consumers, who, for example, often may not realise that many alcoholic beverages contain a lot of sugar. The European Consumer Organisation BEUC stated that the industry was granting itself too much flexibility to decide how much information consumers can see on-label. As consumers often make purchasing decisions in a matter of seconds, BEUC considers it unrealistic to expect that they would take a few minutes to check online how calorific wine or vodka is, adding that more than 30% of consumers did not own a smartphone. However, it should be noted that Recital 51 of the FIR states that "*food information rules should be able to adapt to a rapidly changing social, economic and technological environment*". Since the adoption of the FIR, information and communication technologies have become vastly more accessible and widespread. The industry, on the other hand, claims that there is much more space to include more information for consumers online and off-label. It also insists that, in an increasingly digitising world, a growing number of consumers rely on online information for the products they consume. In general, off-label information is fast becoming the norm for many products and purchases. Some years ago, a new computer came with 2 or 3 telephone directory size instruction books. That kind of information, and indeed the instruction manuals for many devices, are now only available online. Banking services, transport bookings, entertainment, all of these are now fully electronic and highly integrated into many consumers' behaviour. An increasing number of consumers is familiar with finding information through their smartphones. It should also be noted that scanning barcodes via in-store scanner facilities has been suggested as possible solution for people without smartphone.

The Commission will now review the industry's joint proposal. If the industry's joint proposal does not satisfy the Commission, the latter will reportedly launch an impact assessment to review all available options. All interested stakeholders should closely follow this process, in

particular if the Commission decides to launch an impact assessment to review available options, which might very well include mandatory labelling.

Regional integration and trade facilitation: Towards the harmonisation of nutrition labelling within ASEAN?

The harmonisation of nutrition labelling within the Association of Southeast Asian Nations (ASEAN), consisting of the Member States of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam, has been identified as an important matter for regional integration. On 28 February 2018, the ASEAN Food and Beverage Alliance (hereinafter, AFBA), with the support of Food Industry Asia (hereinafter, FIA), published '*Nutrition Labelling on Prepackaged Food: Impact on Trade in ASEAN*' (hereinafter, the report), a report with the University of Malaya's Faculty of Economics and Administration evaluating the impacts of non-harmonised nutrition labelling on food businesses in the ASEAN market. The aim was to understand technical barriers concerning nutrition labelling within each ASEAN Member State (hereinafter, AMS), and to recommend measures in order to facilitate the removal of these barriers and to open intra-ASEAN trade for the pre-packaged food and beverage (hereinafter, PPF) sector.

The report found the region's PPF sector to be highly regulated, with an estimated 42.75% of the region's non-tariff measures (NTMs) affecting this sector. The PPF sector is a promising segment of the foodstuffs industry in regional trade. It recorded a higher annual average growth rate (15.11% for the period 2000-2015) and a higher share of intra-regional exports in the total global exports (56.1% in 2015), relative to foodstuffs. Despite many of the regulations being broadly similar, the report noted that crucial, "*nuanced differences in the labelling requirements prevail across the region*". "*Specifically, regulatory incoherence is evident from the breakdown of the seven core elements of nutrition labelling. The non-harmonised labelling regulation and the high export coverage of labelling would therefore have profound implications for export performance of packaged foods*". According to the report, the nutrition labelling regulations across AMSs rest on different international guidelines followed by AMSs when preparing national regulations. The report points out that, for nutrition labelling, *inter alia*, Singapore, Malaysia, Brunei, Lao PDR, Viet Nam and Cambodia have followed *Codex* guidelines in preparing their regulations. Conversely, Thailand and the Philippines, to some extent, adapted US nutrition labelling guidelines.

The market survey and interviews with 26 food exporters within ASEAN, carried out for the report, revealed that nutrition (function) claims and nutrition reference values (hereinafter, NRVs) in the region are cited by many exporters to be more complex than the *Codex* benchmark. "*Importantly, the inconsistencies in regulations are noted even for the established markets in ASEAN, such as Malaysia, Thailand, the Philippines and Indonesia. Multiple costs are incurred in complying with nutrition labelling due to an introduction or change in legislative requirement in the ASEAN export market*". The report also found that "*apart from the impact on business compliance costs, complex nutrition labelling schemes are found to distort trade through product price increases and/or market- and product losses*". Therefore, while most of the measures affecting the industry are non-tariff measures and policies, the eventual impact is that they become barriers to trade. The report underlines that businesses throughout the region seek a certain degree of consistency in nutrition labelling and broadly support the alignment of the guidelines with *Codex* and the harmonisation towards common labelling schemes in order to reduce compliance costs and address the existing information overload on nutrition for consumers. Still, the report notes that that a single nutrition label might not be practical for the entire ASEAN region, also considering that consensus among all ASEAN regulators would be needed to move the harmonisation process forward.

In order to advance the harmonisation of mandatory guidelines and the streamlining of voluntary measures, the report recommends three steps to boost regional trade. First, the

adoption of a mandatory standard format, aligned with *Codex*, that identifies the minimum requirements within the basic nutrient list of *Codex*. Second, streamlining Nutrition Reference Values as a priority across the region. Third, achieving consensus on a standardised Nutrition Information Panel format and design, a common declaration list of carbohydrates, and list minerals and vitamins, and a common list of claims and criteria for nutrition (functional) claims. The recommendations suggest that: 1) Not all elements of nutrition labelling can be made mandatory and harmonised; 2) Even within those elements that should be mandatory, they should be done sequentially aligning them with the *Codex* guidelines before the identification of the mandatory requirements; and 3) A common consensus, list or criteria for the remaining voluntary guidelines be followed by Mutual Recognition Agreements (hereinafter, MRAs).

Regulatory heterogeneity is one of the core challenges for increasing trade, harmonising standards, and ultimately creating an integrated ASEAN '*single market*'. Already ahead of the establishment of the ASEAN Economic Community (AEC) in 2015 and since the beginning of ASEAN cooperation and subsequent efforts in moving towards regional integration, a number of important initiatives focusing on food safety have been implemented through the establishment of various ASEAN bodies under the respective purviews of the ASEAN Ministers of Agriculture and Forestry (AMAF), ASEAN Economic Ministers (AEM) and the ASEAN Health Ministers Meeting (AHMM).

As ASEAN establishes and increasingly regulates an integrated market for food, the ASEAN Food Safety Policy was endorsed by Economic Ministers (AEM), ASEAN Health Ministers (AHM) and ASEAN Ministers of Agriculture and Forestry (AMAF) in August 2015 and adopted by the ASEAN Leaders during the ASEAN Summit in November 2015. It provides the basis for coordination and establishes a common purpose across the relevant ASEAN Ministers Meetings and ASEAN bodies. The agreed principles of the ASEAN Food Safety Policy are intended to serve as guidance and to facilitate the development of a sustainable and robust food safety regulatory framework for the region. The objectives of the ASEAN Food Safety Policy are to provide direction to relevant ASEAN Sectoral Bodies and AMSs with the goal of protecting the health of ASEAN consumers, ensuring fair practices in food trade and facilitating the free movement of safe food products within the region, and include: 1) Establishing and implementing food safety measures; 2) Fostering the process of harmonisation of food safety measures and control procedures of ASEAN Member States; and 3) Supporting the efforts of ASEAN Member States in strengthening national food control systems.

The ASEAN Food Safety Policy addresses all sectors concerned with food safety assurance and control, including agriculture, health, industry and trade. The ASEAN Food Safety Policy comprises 10 core principles, which provide a guide and direction for the development and implementation of the initiatives of ASEAN bodies responsible for all aspects of food safety and food safety regulatory systems in AMSs. Further efforts need to be made to implement the ASEAN Food Safety Policy, including the adoption of relevant *Codex* standards and the finalisation of the ASEAN Food Safety Regulatory Framework to create a single ASEAN market to enable regional trade in food products. As regards nutrition labelling, Principle 5 is particularly important, stating: "*Consistency with ASEAN Trade in Goods Agreement (ATIGA) as well as with the World Trade Organisation's (WTO) Agreements on Sanitary and Phytosanitary (SPS) Measures and on Technical Barriers to Trade (TBT) Agreements (i.e., food import/export requirements of ASEAN Member States shall be consistent with those agreements)*." Principle 7 is also particularly relevant, stating: "*Harmonisation with International standards (i.e., ASEAN Sectoral Bodies engaged in the harmonisation of standards and requirements for food safety and food control should ensure that these are based on international standards)*".

ASEAN Sectoral Bodies engaged in the harmonisation of standards and requirements for food safety and food control should ensure that these are based on international standards, which is also important in view of international trade rules in the context of the World Trade Organization (WTO). When establishing harmonised food safety measures or standards for

food safety and food control at the regional level, the adoption of internationally accepted standards, guidelines and recommendations and, in particular, those issued by the *Codex Alimentarius* Commission, must be the first option. Such harmonisation should indeed be done in line with international standards and guidelines. The *Codex* '*Guidelines on Nutrition Labelling*' (CAC/GL 2-1985, last revised in 2011 and last amended in 2017 with an Annex adopted in 2011 and last revised in 2017) provides that a nutrient declaration should be mandatory for all pre-packaged foods for which nutrition or health claims are made.

Nutrient declarations should be mandatory for all other pre-packaged foods, except where national circumstances would not support such declarations. Where a nutrient declaration is applied, the declaration of the following should be mandatory: energy value; the amounts of protein, available carbohydrate (*i.e.*, dietary carbohydrate excluding dietary fibre), fat, saturated fat, sodium and total sugars; the amount of any other nutrient for which a nutrition or health claim is made; and the amount of any other nutrient considered to be relevant for maintaining a good nutritional status, as required by national legislation or national dietary guidelines. The guidelines establish Nutrient Reference Values (NRVs) for vitamins, minerals and proteins for the general population identified as individuals older than 36 months. More specific NRVs have been established for levels of nutrients associated with the reduction in the risk of diet-related noncommunicable diseases, not including nutrient deficiency diseases or disorders (NRVs-NCD). They should be used for labelling purposes to help consumers make choices that contribute to an overall healthy dietary intake. The '*Guidelines for use of Nutrition and Health Claims*' (CAC/GL 23-1997) address nutrition claims (*i.e.*, any representation, which states, suggests or implies that a food has particular nutritional properties, including but not limited to the energy value and to the content of protein, fat and carbohydrates, as well as the content of vitamins and minerals), as well as nutrient function claims (a nutrition claim that describes the physiological role of the nutrient in growth, development and normal functions of the body).

A number ASEAN Sectoral Bodies are relevant for this field. For instance, the ASEAN Consultative Committee on Standards and Quality's (ACCSQ) Product Working Group on Prepared Foodstuff (PFPWG) Task Force on the Harmonisation of Food Safety Standards for Prepared Foodstuff deals, *inter alia*, with requirements for labelling of pre-packaged food, while the ACCSQ/PFPWG Task Force on MRA Development for Prepared Foodstuff addresses food safety standards, labelling (including mandatory statements and nutrition claims) and the registration of food products and food establishments. These are the appropriate venues to discuss and address the regional harmonisation of nutrition labelling within ASEAN Member States. In this regard, the report held that representation from the food industry in regional working groups was essential to inform the discussion on the complexity of the regulations, the extent of incoherence in the regulations, and, more importantly, the minimum similarities in the requirements that would benefit the industry and facilitate regional trade. Increased private sector engagement, which is a driver of the ASEAN Economic Community (AEC) 2025 Blueprint, looks poised to deliver important trade facilitation results and enhance good regulation across the region.

Taking into account international standards and the participation of the food industry in the process are central for the successful harmonisation of nutrition labelling within ASEAN. All interested stakeholders and food businesses within ASEAN should carefully analyse the report and its findings and engage within the relevant ASEAN *fora,* particularly ACCSQ and the ASEAN Trade Facilitation Joint Consultative Committee (ATF-JCC). As noted above, harmonisation in this sector can deliver important trade facilitation and trade benefits across the ASEAN region.

Recently Adopted EU Legislation

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2018/469 of 21 March 2018 authorising the placing on the market of an extract of three herbal roots (Cynanchum wilfordii Hemsley, Phlomis umbrosa Turcz. and Angelica gigas Nakai) as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council, and amending Commission Implementing Regulation (EU) 2017/2470*

- *Commission Implementing Regulation (EU) 2018/470 of 21 March 2018 on detailed rules on the maximum residue limit to be considered for control purposes for foodstuffs derived from animals which have been treated in the EU under Article 11 of Directive 2001/82/EC*

- *Commission Implementing Regulation (EU) 2018/462 of 20 March 2018 authorising an extension of use of L-ergothioneine as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council, and amending Commission Implementing Regulation (EU) 2017/2470*

- *Commission Implementing Regulation (EU) 2018/461 of 20 March 2018 authorising an extension of use of taxifolin-rich extract as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council, and amending Commission Implementing Regulation (EU) 2017/2470*

- *Commission Implementing Regulation (EU) 2018/460 of 20 March 2018 authorising the placing on the market of Ecklonia cava phlorotannins as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470*

- *Commission Implementing Regulation (EU) 2018/456 of 19 March 2018 on the procedural steps of the consultation process for determination of novel food status in accordance with Regulation (EU) 2015/2283 of the European Parliament and of the Council on novel foods*

- *Council Decision (EU) 2018/416 of 5 March 2018 authorising the opening of negotiations for a revised Lisbon Agreement on Appellations of Origin and Geographical Indications*

Other

- *Notice concerning the entry into force of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part*

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